

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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<b>APPLICATION TO CHANGE WATER RIGHT ) NO. 41J 30154899 BY ROUND GROVE ) RANCH CO., INC )</b>	<b>PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
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On February 9, 2022, Round Grove Ranch Co., Inc. (Applicant) submitted Application to Change Water Right No. 41J 30154899 to change Statement of Claim No. 41J 206397-00 to the Lewistown Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated July 13, 2022. The Applicant responded with information dated October 18, 2022. The Application was determined to be correct and complete as of January 12, 2023.

An Environmental Assessment for this Application was completed on January 26, 2023.

**INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

**Application as filed:**

- Application to Change Water Right (Additional Stock Tanks), Form 606-ST
- Attachments
  - Proposed pump specifications and proposed pump curves
  - Photos of existing development and proposed system
  - Reciprocal Access Agreement with USDA/Helena National Forest allowing water system development on National Forest lands dated March 17, 2014.
- Maps:
  - Original claim map for Statement of Claim 41J 206397-00 (Application Exhibit A)
  - Proposed system Map (Application Exhibit B)
  - Aerial Photo maps of proposed developments
  - Schematics of proposed water troughs
  - Elevation profiles of proposed system

- Reciprocal Access Agreement between the Applicant and the United States Forest Service signed March 17, 2014 authorizing the Applicant's proposed addition of storage tanks to United States Forest Service land

#### Information Received after Application Filed

- Deficiency Letter Response prepared by law firm Franz & Driscoll, PLLP dated October 18, 2022, and received by DNRC on October 18, 2022.

#### Information within the Department's Possession/Knowledge

- Environmental Assessment for this Application completed on January 26, 2023.
- DNRC surface and groundwater rights records
- Department Technical Report, dated January 12, 2023
- Montana Cadastral property information

The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Lewistown Regional Office at 406-538-7459 to request copies of the following documents.

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, Chapter 2, Part 3, Part 4, MCA).

### **WATER RIGHT TO BE CHANGED**

#### **FINDINGS OF FACT**

1. The Applicant is proposing to change Statement of Claim 41J 206397-00, which lists a flow rate of 35 gallons per minute (GPM) of groundwater diverted from a developed spring (Unnamed Tributary of Wagner Gulch) located in the SESWNW of Section 35, T12N R2E, Meagher County. The purpose of this water right is stock use for 303 animal units (AU), and the claimed periods of diversion and use are May 1 to November 30. The claimed place of use is located in the S2NE, SWSENE, and SESWNE of Section 35, T12N R2E. The point of diversion is in the SESWNW of Section 35, Township (T) 12 North (N) Range (R) 2 East (E). The claimed place of use is 30 miles ENE of Helena, Montana, in the S2NE, SWSENE, and SESWNW of Section 35, T12N R2E in Meagher County. Table 1 lists the claimed elements of the water right proposed for change.

**Table 1: ELEMENTS OF THE WATER RIGHT PROPOSED FOR CHANGE**

W.R. NO.	FLOW RATE	VOLUME	PURPOSE	PERIOD OF USE/DIVERSION	PLACE OF USE	POINT(S) OF DIVERSION	PRIORITY DATE
41J 206397-00	35.00 GPM	Unquantified	Stock	5/1-11/30	S2NE, SWSENW, SESWNW Sec. 35 T12N R2E	SESWNW Sec. 35 T12N R2E	January 1, 1875

2. The place of use of Statement of Claim 41J 206397-00 is not supplemental or commingled with any other water rights
3. There have been no previous change authorizations to Claim 41J 206397-00.
4. Statement of Claim No. 41J 206397-00 was included in the Preliminary Decree issued for the Smith River Basin (Basin 41J) on December 16, 2010.

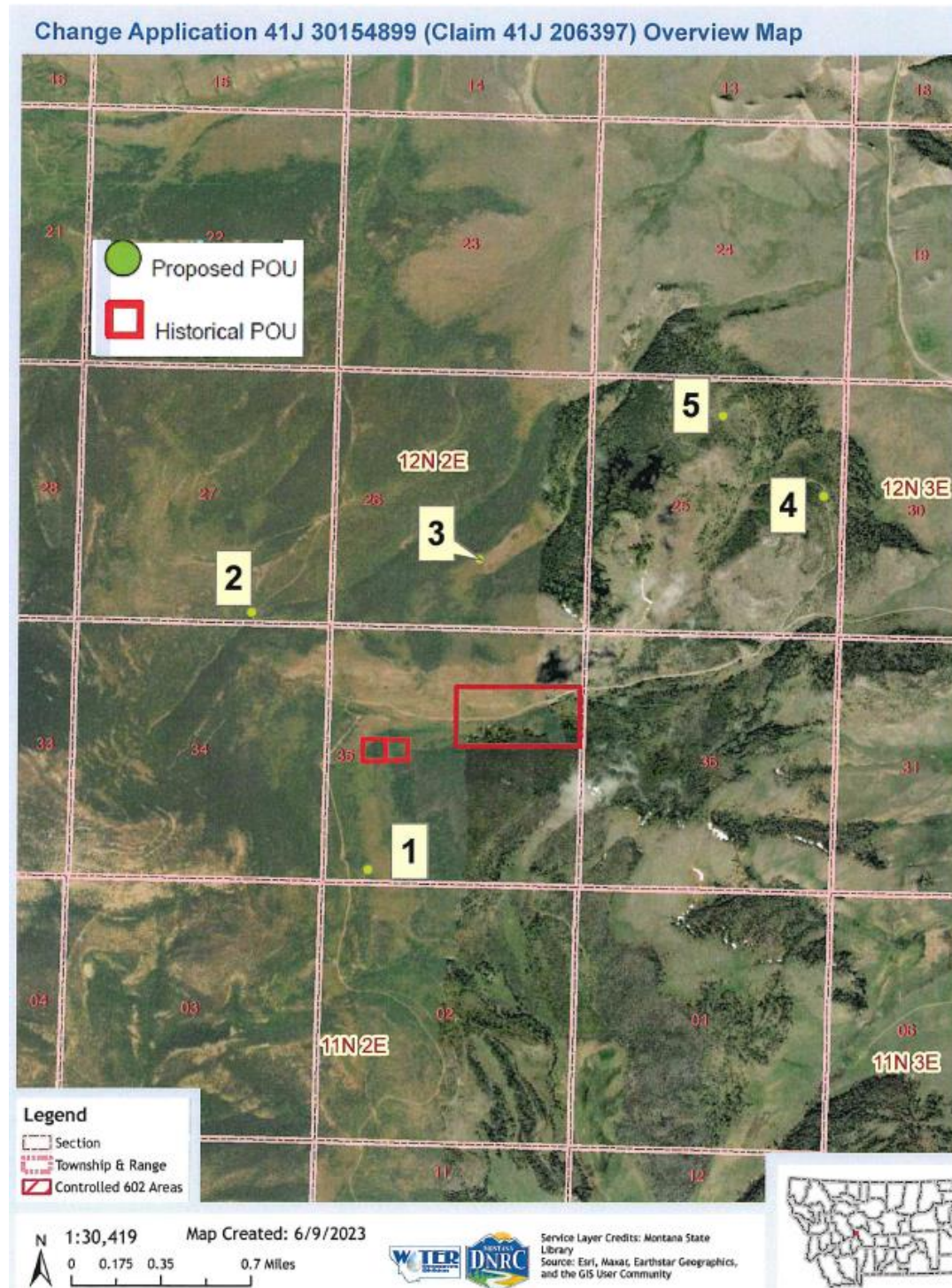
## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

5. The Applicant proposes to add 35 stock tanks in 5 locations (Table 2) to the place of use of Statement of Claim No. 41J 206397-00. This change is intended to reduce the livestock grazing and trailing pressure on livestock watering sites. The Applicant has summer grazing for 1500 ewes and 2 horses 303 claimed animal unites (AU)) in the place of use and this number of livestock will not be changing. Historically, livestock drank directly from 3 tanks fed by the developed spring, both located in the SESWNW of Section 35, T12N R2E. This change is a result of the Applicant working in conjunction with the USFS and NRCS to improve water access for livestock, and reduce livestock grazing and trailing pressure on livestock watering sites. The Applicant has a Reciprocal Use Agreement dated March 17, 2014, to allow water system development on USFS lands. This application proposes to use a lift pump to raise the water to a hilltop holding tank which will then gravity-distribute water to the proposed stock tanks. After this change, a total of 38 stock tanks will be located in 8 locations within the place of use for Statement

of Claim 41J 206397-00. The flow rate, volume, purpose, and period of diversion of this water right will not change. Map 1 shows the proposed elements of this change.

**Map 1: Map of Proposed Changes**



6. There will be three main pipeline routes serving the 35 new stock tank locations. The first pipeline will serve stock tank locations 2 and 3 (see table 2) via a 1.5-inch diameter pipeline. The second pipeline will serve stock tank location 1 (see table 2) via 1.5-inch diameter pipeline. The third pipeline will serve stock tank locations 4 and 5 (see table 2) via 1.5-inch diameter pipeline.

**Table 2: ADDITIONAL STOCK TANK LEGAL LAND DESCRIPTIONS:**

ID	Township, Range, Section	Quarter Sections	Number of Tanks
1	T12N R2E S35	SESWSW	7
2	T12N R2E S27	SESWSE	7
3	T12N R2E S26	SWNWSE	7
4	T12N R2E S25	SESENE	7
5	T12N R2E S25	SWNWNE	7

## **CHANGE CRITERIA**

7. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶¶ 8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person

with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

8. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, at ¶¶ 29-31; *Town of Manhattan*, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

## **HISTORIC USE AND ADVERSE EFFECT**

### **FINDINGS OF FACT - Historic Use**

9. The original filing for Statement of Claim 41J 206397-00 claimed 50 miner's inches (561 GPM or 1.25 cubic feet per second) for a flow rate. This flow rate resulted in a Flow Rate Issue Remark being placed on the water right, which was resolved by the Montana Water Court by modifying the flow rate to 35 GPM per Montana Water Court case # 41J-9 Master's Report dated December 4<sup>th</sup>, 2012.

10. Based on historical accounts provided by the Applicant, in early spring, the excess water from the tank flows in the gulch up to 35 Gallons Per Minute (GPM). By early June, excess flows through the tank and in the gulch have been reduced to approximately 15 GPM, and by September, the flows can drop to as low as 10 GPM. The Department finds the maximum diverted flow rate to be 35 GPM.

11. According to the Applicant, livestock historically grazed the place of use between May 1 and November 30 (214 days). The purpose for Statement of Claim 41J 206397-00 is stock watering for a claimed 303 AU. According to the Applicant, there are currently 3 stock tanks within the place of use located in S2NE, SWSE, and SESWNW of Section 35 of T12N, R2E in Meagher County. The Department's assessment of historic consumptive use is based on the

number of AU claimed. The original claim form reflects 2 horses and 1,500 sheep. A grazing lease document included in the water right file reflects 70 cattle. The water right file for this claim also includes a Forest Service grazing permit for 70 cattle, however these cattle were not included in the total claimed number of AU because the Department's historic use analysis is limited to the number of AU provided in the original claim filing which was later decreed by the Montana Water Court (303 AU). Based on this information, the total number of 303 AU considered in the Department's historic use analysis reflects stock watering for 1,500 sheep (300 AU) and 2 horses (3 AU).

12. The Department calculates the historic consumptive use by multiplying the number of animal units by 0.017 AC-FT per year per animal unit based on the New Appropriations water use standard for stock watering in ARM 36.12.115(2)(c). The Department's calculation for the historic consumed volume is provided below:

$$0.017 \text{ AF/AU/year} \times 303 \text{ AU} / 365 \text{ days/year} \times 214 \text{ days/period of use} = 3.02 \text{ AF}$$

Based on this information, the Department finds a historic consumptive volume of 3.02 AF.

13. The diverted volume for stock is considered by the Department to be 100% consumptive, therefore the historically diverted volume is equal to the historical consumed volume. Based on this information the Department finds the historic diverted volume of Statement of Claim 41J 206397-00 to be 3.02 AF.

14. The Department finds the following historic use for Statement of Claim 41J 206397-00:

**Table 3: Historic Use**

WR Claim #	Animal Units	Diverted Volume	Flow Rate	Purpose	Consump. Use	Place of Use	Point of Diversion
41J 206397-00	303	3.02 AF	35 GPM	Stock	3.02 AF	S2NE, SWSENW, SESWNW Section 35 T12N R2E	T12N R2E, Section 35:  SESWNW

*FINDINGS OF FACT – Adverse Effect*

15. The Applicant proposes to add five new stock tanks to the place of use for Statement of Claim 41J 206397-00 for the continued purpose of watering 303 AU. Groundwater will continue to be diverted from the developed spring/historic point of diversion during the historic period of diversion after this change. A 13,000 gallon holding tank is also proposed to be added to store water that will be secondarily pumped at a flow rate of 12 GPM (based on pump capacity) from the developed spring at night for later use. The holding tank is not considered a place of storage per ARM 36.12.113(7) as it is part of the proposed water system and the proposed flow rate and volume of water does not exceed the historic use. The secondary pump will not exceed the historical flow rate due to the pump capacity, and the added storage will not increase diverted or consumptive use because it will serve the same number of livestock.

16. The added stock tanks will not increase the diverted or consumed volume because they are serving the same number of livestock. After this change there will be a total of 38 stock tanks in 8 locations located in the Applicant's place of use, including 3 existing tanks located in the S2NE, SWSENW, and SESWNW of Section 35 T12N R2E. The stock tanks will feature float shut-off valves to ensure that post-change diverted and consumed volumes do not exceed the historic use.

17. Because there will be no changes to the period of use, no changes to the number of animal units, the flow rate will be regulated by the secondary pump with a capacity of 12 GPM and no change to the volume of water that will be diverted, there will be no change in drawdown of nearby groundwater appropriations in the source aquifer. As a result, there will be no changes to any aquifers because the historic and proposed consumptive uses are the same.

18. The Department finds there will be no adverse effect resulting from the proposed change under the terms and conditions set forth in this Preliminary Determination.

**BENEFICIAL USE**

*FINDINGS OF FACT*

19. The Applicant proposes to use water for stock purposes with Statement of Claim 206397-00. Stock use is identified as a beneficial use of water under MCA 85-2-102.

20. The current place of use of the water right being changed consists of 3 stock tanks located S2NE, SWSENW, and SESWNW of Section 35 T12N R2E. After this change, the Applicant

proposes to continue diverting a volume of 3.02 AF of groundwater at a flow rate of 35 GPM for stock watering of 303 AU, including 1,500 sheep and 2 horses. The post-change periods of diversion and use are May 1 to November 30. The historical amount of water used, diverted flow rate, and point of diversion will not change. The historical place of use consisting of 3 stock tanks located S2NE, SWSENW, and SESWNW of Section 35 T12N R2E will continue to be used, and after this change the Applicant will add five new stock tanks generally located in Sections 25, 26, 27, and 35 of T12N R2E in Meagher County. The proposed addition of stock tanks is intended to improve the efficiency in the Applicant's grazing operation and reduce livestock grazing pressure at the current watering sites.

21. The Department finds the proposed addition of five stock tanks for the purposes of appropriating 3.02 AF of stock water at a flow rate of 35 GPM with Statement of Claim 41J 206397-00 to be a beneficial use of water.

## **ADEQUATE DIVERSION**

### **FINDINGS OF FACT**

22. The primary point of diversion of Statement of Claim 41J 206397-00 consists of a developed spring (Unnamed Tributary of Wagner Gulch), which has been historically developed into 3 onsite stock tanks which water from the developed spring flowed into through a pipeline. This groundwater point of diversion is proposed to be further developed with a cistern (pumping pit) and propane-powered 12 GPM-capacity pump which will raise diverted water 250 feet in elevation to a 13,000-gallon holding tank. The holding tank will then distribute water to the five new stock tanks by gravity flow. These new stock tanks have float valves which will prevent water from being diverted when there are still sufficient amounts of water in the tank to fulfill stock watering needs, ensuring that the amount of water diverted and consumed for 303 AU after this change will not exceed historic use.

23. The maximum flow rate that will be diverted by the secondary pump and conveyed to the five proposed stock tanks is 12 GPM. The secondary flow rate of 12 GPM in addition to any simultaneous uses of water by livestock at the 3 historical remaining stock tanks will not exceed 35 GPM. After this change, a total number of 38 stock tanks in 8 locations will be used by the Applicant with Statement of Claim 41J 206397-00.

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

24. The Applicant has submitted a written Reciprocal Access Agreement with the USDA Forest Service/Helena National Forest, dated March 17, 2014 that specifically authorizes the Applicant's use of post-change water pipelines, tanks, and storage tanks in accordance with MCA § 85-2-402(2)(d).

## **CONCLUSIONS OF LAW**

### **HISTORIC USE AND ADVERSE EFFECT**

25. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change

provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).<sup>1</sup>

26. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.<sup>2</sup>

27. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.<sup>3</sup> A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is

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<sup>1</sup> DNRC decisions are available at:

[http://www.dnrc.mt.gov/wrd/water\\_rts/hearing\\_info/hearing\\_orders/hearingorders.asp](http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp)

<sup>2</sup> See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

<sup>3</sup>A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).<sup>4</sup>

28. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once

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<sup>4</sup> Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation"); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo., 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶144; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).<sup>5</sup>

29. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

30. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent

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<sup>5</sup> The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

31. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. A.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. A.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. A.R.M. 36.12.1901 and 1903.

32. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

33. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

34. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 41J 206397-00 of 3.02 acre-feet diverted volume and 35 GPM flow rate with a consumptive use of 3.02 acre-feet. (FOF Nos. 9-14)

35. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 15-18)

### **BENEFICIAL USE**

36. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the

hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. A.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

37. The Department may issue a change authorization for less than the amount of water requested, but may not issue a change authorization for more water than is requested or more water than can be beneficially used without waste for the purpose stated in the application. §85-2-312, MCA; see also, McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900).

38. The Department can also consider waste in a change proceeding. Hohenlohe at ¶ 71. Waste is defined to include the “application of water to anything but a beneficial use.” §85-2-102(23), MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. E.g., Stellick, supra.

39. Applicant proposes to use water for Stock which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that their proposed use is a beneficial use and that 3.02 acre-feet of diverted volume and 35 GPM flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 19-21)

### ADEQUATE MEANS OF DIVERSION

40. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6<sup>th</sup> Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

41. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 22-23)

### POSSESSORY INTEREST

42. Pursuant to §85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM. 36.12.1802

43. If the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant must have any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water in accordance with MCA §85-2-402(2)(d).

44. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 24)

### PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 41J 30154899 should be **GRANTED** subject to the following.

The Department has determined that the Applicant may add five new stock tanks to Statement of Claim 41J 206397-00, for a total of 38 stock tanks that will be used with this claim. 7 of the new stock tanks will be located in Sections 26, which is owned by the United States Forest Service; the remaining 28 stock tanks will be located on land owned by the Applicant. After this change a flow rate of 35 GPM up to a volume of 3.02 AF of water will continue being diverted from a developed spring located in the SESWNW of Sec. 35 T12N R2E, for the purpose of stock watering of 1,503 AU.

### **NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 9<sup>th</sup> day of May, 2023.

/Original signed by Steven Hamilton/  
Steven Hamilton, Manager  
Lewistown Regional Office  
Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 9<sup>th</sup> day of May 2023, by first class United States mail.

NAME AND ADDRESS OF ATTORNEY:

RYAN MCLANE, FRANZ & DRISCOLL, PLLP  
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HELENA, MT 59624-1155

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